BRB No. 00-1202 BLA

DENNIS E. KEENE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
G & A COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Dennis E. Keene, Bandy, Virginia, *pro se*.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

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[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Clement J. Kichuk. In a letter dated September 29, 2000, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (96-BLA-0364) of Administrative Law Judge Clement J. Kichuk denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time. In the original Decision and Order, Administrative Law Judge Vivian Schreter-Murray credited claimant with thirty-four years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Schreter-Murray found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304(a) and (c) (2000). Accordingly, Judge Schreter-Murray awarded benefits. In response to employer's appeal, the Board affirmed Judge Schreter-Murray's findings at 20 C.F.R. §718.304(a) and (c) (2000). *Keene v. G & A Coal Co.*, BRB No. 96-1689 BLA-A (Sept. 19, 1997)(unpub.). However, the Board subsequently granted employer's request for reconsideration and vacated Judge Schreter-Murray's award of benefits because her analysis of the x-ray evidence was not in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The Board instructed Judge Schreter-Murray to re-weigh the x-ray evidence and to provide a specific rationale for the weight that she accords the conflicting x-ray readings relevant to whether claimant established complicated pneumoconiosis at 20 C.F.R. §718.304(a) (2000). *Keene v. G & A Coal Co.*, BRB No. 96-1689 BLA-A (Dec. 23, 1997)(unpub.).

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[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

On the first remand, Judge Schreter-Murray found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a) and (c) (2000). Accordingly, Judge Schreter-Murray again awarded benefits. In disposing of employer's second appeal, the Board vacated Judge Schreter-Murray's findings at 20 C.F.R. §718.304(a) and (c) (2000), and remanded the case for further consideration of the evidence. The Board noted that employer's appeal of Judge Schreter-Murray's denial of its Motion to Recuse is moot because she is no longer with the Department of Labor. Lastly, the Board held that it did not need to address the propriety of Judge Schreter-Murray's ruling on employer's Motion to Vacate and for Reconsideration in view of the disposition of the case. *Keene v. G & A Coal Co.*, BRB No. 98-1560 BLA (Jan. 21, 2000)(unpub.).

On the most recent remand, the case was transferred to Administrative Law Judge Clement J. Kichuk (the administrative law judge), who found the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a)-(c) (2000). The administrative law judge also found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000). Further, the administrative law judge found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to respond to claimant's appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the

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[3]In a Decision on Employer's Motion to Recuse dated August 10, 1998, Administrative Law Judge Vivian Schreter-Murray denied employer's request that she recuse herself from the case. In addition, in a Ruling on Employer's Motion to Vacate and for Reconsideration, Judge Schreter-Murray denied employer's request that she vacate her 1996 Decision and Order and her 1998 Decision and Order on Remand. Judge Schreter-Murray also denied employer's request for reconsideration.

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In finding the evidence insufficient to establish the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a) (2000), the administrative law judge considered x-ray evidence and CT scan evidence. Of the twenty-six x-ray interpretations of record, sixteen readings are positive for pneumoconiosis, nine readings are negative and one x-ray is unreadable. Further, the record indicates that of the sixteen positive x-ray readings, only one x-ray demonstrated the presence of complicated pneumoconiosis. The administrative law judge stated, "[p]rior to determining whether these films establish complicated pneumoconiosis, they must first show the existence of pneumoconiosis." Decision and Order on Remand at 16. The administrative law judge rationally found the conflicting readings of x-rays dated November 9, 1987, August 19, 1989 and August 23, 1991 to be insufficient to satisfy claimant's burden to prove the existence of pneumoconiosis since they are equally balanced. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge stated that "[t]he remainder of the x-ray readings in the record, dating from December 16, 1991 to September 13, 1995, vary considerably,

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[5]Although Dr. Templeton indicated that there were parenchymal abnormalities consistent with pneumoconiosis in the September 13, 1995 x-ray, Dr. Templeton did not classify the x-ray in accordance with the ILO-U/C classification system. 20 C.F.R. §718.102; Employer's Exhibit 6.

[6]Whereas Dr. Templeton, a B-reader and a Board-certified radiologist, read x-rays dated November 9, 1987 and August 19, 1989 as positive for pneumoconiosis, Employer's Exhibit 6, Drs. Scott and Wheeler, B-readers and Board-certified radiologists, read the same x-rays as negative for pneumoconiosis, Director's Exhibit 36. Similarly, whereas Drs. Scott and Templeton read the August 23, 1991 x-ray as positive for pneumoconiosis, Employer's Exhibit 6; Director's Exhibit 36, Dr. Wheeler read the same x-ray as negative for pneumoconiosis, Director's Exhibit 36. With regard to the x-rays dated November 9, 1987 and August 19, 1989, the administrative law judge stated, "given their equivalent professional qualifications and without reliance upon the numerical superiority of negative readings, I find this evidence equally balanced and therefore insufficient to establish the existence of pneumoconiosis." Decision and Order on Remand at 16. The administrative law judge further stated that "[t]he same holds true for the August 23, 1991 film - the same three readers interpreted this x-ray, yet this time [Drs.] Scott and Templeton read it as simple CWP, 1/0 and 1/1 respectively, while Dr. Wheeler found it negative." *Id*.

from 0/1 (negative for CWP) to 2/2, and A, complicated pneumoconiosis." Decision and Order on Remand at 17. In addition, the administrative law judge stated that "the CT scan performed on September 13, 1995 sheds considerably more light on [claimant's] pulmonary condition and therefore makes it impossible to evaluate the x-ray evidence without reference to the CT scan reports." *Id*. The administrative law judge observed that "a film dated March 17, 1995 was read by Dr. Templeton as 2/1 and by Dr. Francke as opacity A - these represent the most positive readings in the record." *Id*. Nonetheless, the administrative law judge concluded that "by reviewing CT scan reports and [claimant's] history of positive tuberculosis tests in 1991 and 1996, it becomes clear how these readings conflicted and why the more experienced readers were able to distinguish between tuberculous scarring from previous infections and CWP." *Id*. Thus, based on his consideration of the x-ray and CT scan evidence, the administrative law judge found the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(a) (2000).

The pertinent regulations require the administrative law judge to evaluate the evidence in each category at 20 C.F.R. §718.304(a), (b) and (c) (2000) before weighing together the categories at 20 C.F.R. §718.304(a), (b) and (c) (2000) and determining invocation. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Inasmuch as the administrative law judge ultimately weighed together all of the evidence in the various categories at 20 C.F.R. §718.304(a), (b) and (c) (2000), *see infra*, we hold that any error by the administrative law judge in considering the x-ray evidence with the CT scan evidence at 20 C.F.R. §718.304(a) (2000) is harmless. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, BLR (4th Cir. 2000); *see also Larioni v. Director, OWCP*, 6 BLR 1-710 (1983). Further, inasmuch as there is no biopsy or autopsy evidence of record, we affirm the administrative law judge's finding that the biopsy and autopsy evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304(b).

Additionally, in finding the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(c) (2000), the administrative law judge considered the relevant medical reports of Drs. Branscomb, Castle, Forehand, Templeton and Wheeler. Dr. Forehand opined that claimant suffers from coal workers' pneumoconiosis complicated by tuberculosis based upon a September 13, 1995 CT scan and chest x-rays. Claimant's Exhibit 1. However, the administrative law judge observed that "Drs. Wheeler, Templeton and Branscomb all reviewed [c]laimant's CT scan and rendered their opinions thereon" and "[n]one of these doctors diagnosed [coal workers' pneumoconiosis] based on the CT scan." Decision and Order on Remand at 17; Employer's Exhibits 1, 5, 8, 12. The administrative law judge also observed that "the opinion of Dr. Castle who, like Dr. Branscomb, possesses superior qualifications in the field of pulmonary medicine corroborates and supports the findings of the CT scan readers [that claimant does not suffer from coal workers'

pneumoconiosis]." Decision and Order on Remand at 17; Employer's Exhibits 3, 11, 13. The administrative law judge permissibly discredited Dr. Forehand's opinion because it is not reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Since the administrative law judge permissibly discredited the only medical opinion evidence of record that could demonstrate the presence of complicated pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumo. *See* 20 C.F.R. §718.304(c).

Therefore, based on the administrative law judge's weighing together of all of the evidence in the various categories at 20 C.F.R. §718.304(a), (b) and (c) (2000), we affirm the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304(a)-(c); *Scarbro, supra*; *Melnick, supra*.

With regard to 20 C.F.R. §718.202(a) (2000), the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis. The administrative law judge considered the relevant x-ray, CT scan and medical opinion evidence of record. As previously noted, the administrative law judge rationally found

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[7]Administrative Law Judge Clement J. Kichuk (the administrative law judge) observed that "[Dr. Forehand] summarily dismisses the conclusions of Dr. Wheeler, a Board-Certified Radiologist, that the nodules found on [the] CT scan are more compatible with TB than CWP by suggesting that a biopsy would clearly show the presence of both disease processes." Decision and Order on Remand at 18. The administrative law judge stated that "[s]uch speculation, unfortunately, is of no help to this Court and, given the impressive qualifications of those physicians who fully explained their findings and conclusions, I accord his opinion little weight." *Id*.

[8]The administrative law judge observed that "[i]n this case, the CT scan proved a superior diagnostic technique in a case which would otherwise have been difficult to reconcile given the widely conflicting x-ray results, as Dr. Wheeler so testified." Decision and Order on Remand at 18. The administrative law judge stated that "[w]hile the x-rays, considered alone, certainly support such a finding due to the March 17, 1995 film, which was read as positive by all five readers who reviewed it, the CT scan evidence outweighs the x-rays based on the superior imaging it provided, as well as the fact that two of the readers who found the March 17, 1995 film positive for CWP, Drs. Wheeler and Templeton, also reviewed the CT scan and concluded that the nodules were in fact most likely due to tuberculosis." *Id*. The administrative law judge additionally stated, "I find and conclude that the readings of 1/0 and 1/1 made on the later films are fully explained by the CT scan findings of all three physicians who reviewed the scan, as healed tuberculosis scarring." *Id*.

the conflicting readings of x-rays dated November 9, 1987, August 19, 1989 and August 23, 1991 to be insufficient to satisfy claimant's burden to prove the existence of pneumoconiosis since they are equally balanced. *See Ondecko, supra*. Further, the administrative law judge stated, "I find and conclude that those x-rays from 1991 to 1995 which were read as positive [for] simple CWP are fully explained by the Ct scan as revealing tuberculin scarring." Decision and Order on Remand at 19. The administrative law judge also stated that "[t]he weight of this evidence, taken together, does not establish by [a] preponderance that [c]laimant has coal workers' pneumoconiosis." *Id*.

In addition, the administrative law judge stated that "the more compelling medical opinion evidence similarly does not support such a finding." *Id*. The administrative law judge observed that "[t]he most persuasive opinions in the record, those of Drs. Castle, Branscomb and Wheeler, all point to a finding that [c]laimant does not suffer from coal workers' pneumoconiosis." *Id*. Inasmuch as the administrative law judge properly considered all relevant evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a); *Island Creek Coal Co. v. Compton*, 211 F.3d 303, BLR (4th Cir. 2000).

Since claimant failed to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis, *see* 20 C.F.R. §718.304, and failed to establish the existence of pneumoconiosis, *see* 20 C.F.R. §718.202(a), an essential element of entitlement, we hold that the administrative law judge properly denied benefits under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[9]In view of our disposition of the case at 20 C.F.R. §718.202(a), we decline to address the administrative law judge's finding at 20 C.F.R. §718.204(c) (2000).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge